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NORTHERN DISTRICT OF CALIFORNIA

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HOME DEPOT U.S.A., INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CV 12 2444

DMR

KUNAAL SHARMA, individually
and on behalf of all others similarly
situated,

Plaintiff,

v.

HOME DEPOT U.S.A., INC. and
DOES 1 through 50, inclusive,

Defendants.

Case No.

DEFENDANT'S NOTICE OF
REMOVAL OF ACTION PURSUANT
TO 28 U.S.C. §§ 1332(D)(2), 1441,
1446, AND 1453

[Supporting Declaration of Donna M.
Mezias, Notice of Related Cases,
Certification of Interested Entities or
Persons and Civil Cover Sheet Filed
Concurrently]

(SAN MATEO COUNTY SUPERIOR
COURT CASE NO. CIV 513089)

DEFENDANT HOME DEPOT U.S.A., INC.'S NOTICE OF REMOVAL OF ACTION PURSUANT TO 28 U.S.C. §§
1332(D)(2), 1441, 1446, AND 1453

1 TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE
2 NORTHERN DISTRICT OF CALIFORNIA:

3 PLEASE TAKE NOTICE that defendant Home Depot U.S.A., Inc. hereby
4 removes to this Court the state court action described below, pursuant to 28 U.S.C. §§
5 1332(d)(2), 1441, 1446, and 1453. In support thereof, Home Depot states as follows:

6 1. On April 11, 2012, the above referenced putative class action was filed and
7 is currently pending against Home Depot in the Superior Court of California, County of
8 San Mateo, No. CIV 513089. On April 13, 2012, Home Depot was served with the
9 complaint. Home Depot filed an answer to the complaint in the Superior Court on May
10 11, 2012. As required by 28 U.S.C. § 1446(a), a true and correct copy of all process,
11 pleadings, and orders served upon defendant as part of the above referenced action are
12 attached to the Declaration of Donna M. Mezias ("Mezias Decl."), filed concurrently in
13 support of this Notice.

14 2. Plaintiff, a former employee of Home Depot, alleges that Home Depot
15 "violated California Labor Code section 1998 and Wage Order 7-2001, section 14 by
16 failing to provide suitable seats to plaintiff and other current and former employees."
17 Complaint, ¶ 1. Based on this alleged violation, plaintiff seeks recovery of penalties
18 under the California Labor Code Private Attorneys General Act ("PAGA"). *See*
19 Complaint, ¶¶ 1, 15-19. The complaint describes a putative class consisting of all
20 California-based associates "who worked in the Greeter position at any time from
21 February 7, 2011 to the present and were not provided a seat." *See* Complaint, ¶ 8.

22 3. Timeliness: Plaintiff filed his complaint in the instant action, No. CIV
23 513089, on April 11, 2012. Home Depot was served with a copy of the complaint on
24 April 13, 2012. Home Depot's Notice of Removal is therefore timely because it is filed
25 within 30 days of service of the complaint. *See* 28 U.S.C. § 1446(b).

26 4. Jurisdiction. The above-described action is a civil action for which this
27 Court has original jurisdiction and thus may be removed pursuant to 28 U.S.C. § 1441.

Under 28 U.S.C. § 1441(a), a defendant may remove to federal district court “any civil action brought in a State court of which the district courts of the United States have original jurisdiction....” Pursuant to the Class Action Fairness Act (“CAFA”), Pub. L. No. 109-2 (enacted Feb. 18, 2005) (codified at 28 U.S.C. §§ 1332(d), 1453, 1711-1715), federal district courts have original jurisdiction over a class action if (1) it involves 100 or more putative class members, (2) any class member is a citizen of a state different from any defendant, and (3) the aggregated controversy exceeds \$5,000,000 (exclusive of costs and interest). *See* 28 U.S.C. §§ 1332(d)(2), (d)(6) and d(11)(B)(i).

5. Class Size. In the complaint, plaintiff alleges that “the Class consists of well over 1,000 individuals.” *See* Complaint, ¶ 10. Home Depot accepts as true, for purposes of removal only, plaintiff’s allegation regarding the size of the class. Based on plaintiff’s allegation, CAFA’s 100-person requirement is “presumptively satisfied.” *See Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 998 (9th Cir. 2007).¹

6. Diversity of Citizenship. At all relevant times, there has been diversity of citizenship between the parties to the action.

7. Plaintiff alleges that he is a resident, and thus a citizen, of the State of California. *See* Complaint, ¶ 2.

8. Home Depot is not a citizen of the State of California. “[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business” 28 U.S.C. § 1332(c)(1). Home Depot is not incorporated in California. Rather, Home Depot is a corporation organized

¹ The presumption applied by the Ninth Circuit related to the amount in controversy requirement; however, district courts have applied *Lowdermilk* to CAFA’s 100-person requirement. *See Coit v. Fidelity Assurance Assocs., LLC*, No. C 08-02585 JSW, 2008 WL 3286978, at *4 (N.D. Cal. Aug. 6, 2008) (where complaint failed to specify size of class, court applied the preponderance of the evidence standard to determine whether CAFA’s 100-person requirement had been met); *see also Saulic v. Symantec Corp.*, No. SA CV 07-610 AHS (PLAx), 2007 WL 5074883, at *8 (C.D. Cal. Dec. 26, 2007) (court must determine whether the evidence established that it was “more likely than not” that the putative class was a particular size).

1 and incorporated under the laws of the State of Delaware. *See* Complaint, ¶ 3. Nor is
 2 California the state in which Home Depot has its principal place of business, which
 3 refers to “the place where a corporation’s officers direct, control, and coordinate the
 4 corporation’s activities.” *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010). Rather,
 5 Home Depot’s principal place of business is Atlanta, Georgia. *See Ottaviano v. Home*
 6 *Depot U.S.A., Inc.*, Civ. No. 1:09-cv-05125, 2010 U.S. Dist. LEXIS 27279, at *3 (N.D.
 7 Ill. Mar. 23, 2010) (Home Depot “is a Delaware corporation with its principal executive
 8 offices located in Atlanta, Georgia”); *Novak v. Home Depot U.S.A., Inc.*, 259 F.R.D.
 9 106, 108 (D. N.J. 2009) (same). Accordingly, this action is between citizens of different
 10 states.

11 9. Amount in Controversy. This action meets the jurisdictional requirement
 12 of CAFA, because more than \$5,000,000 is in controversy. Plaintiff does not allege a
 13 specific amount in controversy in the complaint. Where, as here, the plaintiff fails to
 14 specify an amount of damages, defendant seeking removal must demonstrate that the
 15 amount in controversy requirement has been met. *See Lowdermilk*, 479 F.3d at 998.
 16 Home Depot denies that plaintiff’s claims have any merit or value, but it avers that the
 17 relief plaintiff seeks on behalf of the class exceeds \$5,000,000.

18 10. Plaintiff seeks recovery of penalties under the “fallback” provision of
 19 PAGA, Labor Code section 2699(f), which provides that for Labor Code sections for
 20 which a civil penalty is not specifically provided, PAGA provides a civil penalty of \$100
 21 for each aggrieved employee per pay period for the initial violation and \$200 for each
 22 aggrieved employee per pay period for each subsequent violation. *See* Complaint ¶¶ 1,
 23 15-19; Cal. Lab. Code § 2699(f)(2).

24 11. The term “violation” as used in section 2699(f) is ambiguous, and the
 25 courts have not fully resolved its proper construction. Home Depot avers, for purpose
 26 of removal only, that plaintiff may argue that each pay period without a seat constitutes
 27 a “violation” under section 2699(f). Under that construction, plaintiff may seek

1 penalties of \$100 for the initial violation (i.e., the first pay period for each class member
2 within the statute of limitations period) and \$200 for each class member for subsequent
3 violations (i.e., subsequent pay periods). While Home Depot is not aware of any court
4 that has adopted this construction of 2699(f), it has been accepted for purposes of
5 establishing the amount in controversy at removal. *See Schiller v. David's Bridal, Inc.*,
6 No. 1:10-cv-00616 AWI SKO, 2010 WL 2793650, at *7 (E.D. Cal. July 14, 2010)
7 (denying remand since defendant's calculation of PAGA damages, which relied on \$200
8 for subsequent pay periods, exceeded \$5 million); *Butterworth v. American Eagle*
9 *Outfitters, Inc.*, No. 1:11cv01203 LJO DLB, 2011 WL 4905641, at *4-5 (E.D. Cal. Oct.
10 14, 2011) (same).

11 12. Plaintiff alleges that the class "consists of well over 1,000 individuals."
12 *See* Complaint, ¶ 10. Assuming, for purposes of removal only, that the putative class
13 consists of 1,000 individuals, the penalties sought by the class under PAGA exceed \$5
14 million.

15 13. Plaintiff seeks to represent a class of employees "from February 7, 2011 to
16 the present." Complaint, ¶ 8. Assuming that each of the 1,000 alleged class members
17 worked each pay period from February 7, 2011 through April 13, 2012, the date the
18 complaint was served, plaintiff may seek penalties of \$100 for the initial pay period and
19 \$200 for each of the 30 subsequent bi-weekly pay periods through the date the
20 complaint was filed, or \$6,100, for each class member, and total penalties of
21 \$6,100,000. Thus, CAFA's \$5 million amount in controversy requirement has been met.

22 14. Venue. The United States District Court for the Northern District of
23 California is the judicial district embracing the place where the above referenced action
24 was filed by plaintiff and is therefore the appropriate court for removal pursuant to 28
25 U.S.C. § 1441(a).

15. There are no grounds that would justify this Court in declining to exercise its jurisdiction pursuant to 28 U.S.C. §§ 1332(d)(3) or requiring it to decline to exercise jurisdiction pursuant to 28 U.S.C. §§ 1332(d)(4).

WHEREFORE, defendant requests that the above action now pending against it in the Superior Court of California, County of San Mateo, be removed therefrom to this Court. In the event the Court has any reason to question whether removal in this action was proper, Home Depot requests the opportunity to provide briefing on the issue.

Respectfully submitted,

Dated: May 14, 2012

AKIN GUMP STRAUSS HAUER &
FELD LLP

By Donna M. Mezias
Donna M. Mezias
Attorneys for Defendant
HOME DEPOT U.S.A., INC.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 580 California Street, Suite 1500, San Francisco, CA 94104. On May 14, 2012, I served the document(s) described as:

1. DEFENDANT'S NOTICE OF REMOVAL OF ACTION PURSUANT TO 28 U.S.C. §§ 1332(D)(2), 1441, 1446, AND 1453;
2. DEFENDANT HOME DEPOT U.S.A., INC.'S CERTIFICATION OF INTERESTED ENTITIES OR PERSONS;
3. DECLARATION OF DONNA M. MEZIAS IN SUPPORT OF DEFENDANT HOME DEPOT, U.S.A., INC.'S NOTICE OF REMOVAL OF ACTION;
4. DEFENDANT HOME DEPOT U.S.A., INC.'S NOTICE OF RELATED CASES; and
5. CIVIL COVER SHEET

on the interested party(ies) below, using the following means:

Attorneys for Plaintiff

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Reno, Nevada 89511

☐ BY UNITED STATES MAIL I enclosed the documents in a sealed envelope or package addressed to the respective address(es) of the party(ies) stated above and placed the envelope(s) for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid at San Francisco, California.

☐ BY MESSENGER SERVICE I served the documents by placing them in an envelope or package addressed to the respective address(es) of the party(ies) stated above and providing them to a professional messenger service for service.

☒ BY OVERNIGHT DELIVERY I enclosed the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the respective address(es) of the party(ies) stated above. I placed the envelope or package for

1 collection and overnight delivery at an office or a regularly utilized drop box of the
2 overnight delivery carrier.

3 ☐ BY ELECTRONIC MAIL OR ELECTRONIC TRANSMISSION. Based on a court
4 order or an agreement of the parties to accept service by e-mail or electronic
5 transmission, I caused the document(s) to be sent to the respective e-mail address(es) of
6 the party(ies) as stated above. I did not receive, within a reasonable time after the
7 transmission, any electronic message or other indication that the transmission was
8 unsuccessful.

9 I declare that I am employed in the office of a member of the bar of this court at
10 whose direction the service was made.

11 I declare under penalty of perjury under the laws of the State of California that the
12 foregoing is true and correct. Executed on May 14, 2012 at San Francisco, California.

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Lorraine France-Gorn